

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SCOTT A. NIEDZWIEDZ

Appeal No. 1998-2063
Application No. 08/531,087

HEARD: APRIL 18, 2000

Before COHEN, FRANKFORT, and NASE, Administrative Patent Judges.
FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's refusal to allow claims 1-17 and 23-25 as amended subsequent to the final rejection in a paper filed July 24, 1997 (Paper No. 11). Claims 18-22 stand withdrawn from consideration as being directed to a non-elected invention.

Appellant's invention relates to a reclosable package for holding, for example, windshield wipers, the package including a hollow inner container (120) and an outer sleeve (140) having a slot (141) at one end thereof designed to expose an aperture (151) at an end of the inner container to thereby permit hanging of the package on a hook from the aperture of the inner container and not from the outer sleeve (140). More specifically, as is apparent from Figures 2 through 5, 6A and 6B of the application, the reclosable package comprises a hollow container (120), a backing section (130) constructed and arranged to cover a portion of the back of the container thereby leaving an open removal area (129), a tab (150) extending from a top of said hollow container (120), with said tab (150) including an aperture (151) for hanging said container, and a sleeve (140) constructed and arranged to slide over said hollow container (120) to cover said removal area (129). The sleeve (140) including an enclosure or pocket (142) for receiving the tab (150) and covering a portion of said tab. The enclosure or pocket (142) having a slot (141) to expose both the tab aperture (151) and a portion of said tab, and wherein the enclosure or pocket (142) covering a portion of the tab (150) is located

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along a line that extends through the aperture (151), with the line being substantially horizontal when the package is hung from the hook. A representative copy of independent claim 1, reproduced from appellant's brief, is attached to this decision.

The prior art references of record relied upon by the examiner as evidence of obviousness are:

Zahuranec et al. (Zahuranec)	3,812,963	May 28, 1974
Bredal	4,305,504	Dec. 15, 1981
Reighart	5,027,947	July 2, 1991

Rejections

Claims 1-17 and 23-25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Reighart (Figure 9) in view of one of Zahuranec or Bredal (Figure 2).

Rather than attempt to reiterate the examiner's full commentary with regard to the above noted rejection and the conflicting viewpoints advanced by the examiner and appellant regarding the rejection, we make reference to the final

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rejection (Paper No. 10, mailed March 24, 1997) and the examiner's answer (Paper No. 15, mailed December 2, 1997) for the reasoning in support of the rejection, and to appellant's brief (Paper No. 14, filed October 27, 1997) and reply brief (Paper No. 17, filed January 12, 1998) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art references, and to the respective positions as set forth by appellant and the examiner.

In rejecting claims under 35 U.S.C. §103, the examiner bears the initial burden of presenting a prima facie case of obviousness (see In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993); In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992)), which is established when the teachings of the prior art itself would appear to have suggested the claimed subject matter to one of ordinary skill in the art (see In re Bell, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531

(Fed. Cir. 1993)). The conclusion that the claimed subject matter is prima facie obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988).

With this as our background, we turn to the examiner's rejection of claims 1-17 and 23-25 under 35 U.S.C. § 103 as being unpatentable over Reighart (Figure 9) in view of one of Zahuranec or Bredal (Figure 2).

Prior to evaluating the combination of Reighart and Zahuranec or Bredal, we look to the language of claim 1 on appeal to derive an understanding of the scope and content of the claim. Claim 1 requires a reclosable package comprising a container having a three dimensional configuration, a tab at a first end, a space for containing a product, and an opening to allow the product to be placed in and removed from the space in

the container, a sleeve having an opening at a first end that fits over the first end of the container to cover the opening in the container and an enclosure at a second end thereof that covers the first end of the container and a portion of the tab, the tab having an aperture, the enclosure of the sleeve having a slot exposing the aperture in the tab and a portion of the tab and the slot extending to an edge of the enclosure so that the package is supported only by engagement of a hook with the aperture in the tab and is not supported by the sleeve. The enclosure is further defined to cover a portion of the tab located along a line that extends through the aperture, with the line being substantially horizontal when the package is hung from the hook.

The examiner urges (answer, page 4) that Reighart (in Figure 9) discloses essentially the claimed invention including an exposed portion or tab (50) of the container (20) extending through a sleeve (40) and beyond the end thereof to obviate suspension forces acting on the sleeve (40). The only difference recognized by the examiner between appellant's claimed package and that of Reighart is the lack in Reighart's

package of a slot like that required in the claims on appeal. Zahuranec and Bredal are relied upon by the examiner to teach a package including a slot (31; 20) in an enclosure portion of a package that allows suspension of the package by an aperture (31a; 18) in a tab without the tension forces acting on the enclosure portion of the package. The examiner concludes, from the teachings of the applied references, that to modify "the concept presented by Reighart in Figure 9 to comprise a spaced slot as opposed to an eliminated portion would not provide any unexpected result, as either arrangement would act to eliminate suspension forces acting on the sleeve while reinforcing the tab by additional inclusion of the enclosure portion."

Appellant argues (brief, pages 8-10), and we agree, that one of ordinary skill in the art would have had no motivation to modify the Reighart package of Figure 9 in the manner proposed by the examiner. Like appellant, we consider that the packages of Zahuranec and Bredal are distinctly different from the type of package seen in Figure 9 of Reighart and that the teachings thereof are of such disparate nature that the dispensing package of Zahuranec and the blister type package of Bredal would not

have suggested to one of ordinary skill in the art any motivation for providing the package of Reighart with an enclosure (claim 1) or pocket (claim 9) having a slot as set forth in the claims on appeal. In our opinion, the only motivation to combine Reighart, Zahuranec and Bredal as posited by the examiner is gleaned from appellant's own specification. Thus, it is our view that the examiner has resorted to the use of impermissible hindsight in seeking a reason to modify "the concept" of Reighart (Fig. 9) in light of the concepts depicted in Zahuranec and Bredal in an effort to produce the claimed invention.

Moreover, we note that even if the applied prior art were to be combined in the manner urged by the examiner, the resulting modified package of Reighart Figure 9 would not be that set forth in the claims before us on appeal. Appellant's independent claim 1 requires "an enclosure" at a second end of the sleeve that covers the first end of the container and a portion of the tab, while independent claim 9 on appeal sets forth "a pocket" at one end of the sleeve for receiving the tab and for covering a portion of the tab. It is clear from

appellant's disclosure that the claimed enclosure or pocket surrounds the tab on all sides thereof, except for the area of the slot (141) which exposes the aperture (151) in the tab and a portion of the tab located within the slot. As can be seen from Figure 9 of Reighart, the sleeve (40) therein has no "enclosure" or pocket to receive the tab (50) of the container. Indeed, the entire thrust of this embodiment of Reighart is that the tab extends through a slot (42) in the end of the sleeve and is entirely exposed for allowing hanging of the package from the aperture (51) in the tab. While both Zahuranec and Bredal disclose packages which have slots (31; 20) that expose an aperture (31a; 18) in another portion of the container so that the package may be hung from a hook-type support member by the aperture, they do not teach or suggest an "enclosure" or pocket like that required in appellant's claims on appeal.

In light of the foregoing, we cannot sustain the examiner's rejection of claims 1-17 and 23-25 under 35 U.S.C. § 103(a) as being unpatentable over Reighart (Figure 9) in view of one of Zahuranec or Bredal (Figure 2).

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Thus, the decision of the examiner to reject claims 1-17
and 23-25 under 35 U.S.C. § 103(a) is reversed.

REVERSED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	
)	
)	BOARD OF PATENT
CHARLES E. FRANKFORT)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
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JEFFREY V. NASE)	
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APPENDIX

1. A reclosable package, comprising:

a container having a three dimensional configuration, a tab at a first end thereof, a space for containing a product at a second end thereof, an opening in communication with the space to allow the product to be placed in and removed from the space in the container;

a sleeve having an opening at a first end thereof that fits over the first end of the container to cover the opening in the container when the sleeve is in place on the container, and an enclosure at a second end thereof that covers the first end of the container and a portion of the tab;

the tab of the container having an aperture to enable the package to be hung on a hook;

the enclosure of the sleeve having a slot exposing the aperture in the tab and a portion of the tab when the sleeve is in place on the container; and

the slot extending to an edge of the enclosure so that when the package is hung on a hook while the sleeve is in place on the container, the package is supported only by engagement of the hook with the aperture in the tab, and is not supported by the sleeve,

wherein the enclosure covers a portion of the tab located along a line that extends through the aperture, the line being substantially horizontal when the package is hung from the hook.